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No. 92-78

In The

Supreme Court of the United States

October Term, 1992

SULLIVAN COUNTY, TENNESSEE;
MIKE GARDNER, LYNN HAWKINS,

Petitioners,

v.

JOHN DOE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF OF RESPONDENT JOHN DOE IN OPPOSITION

EVERETT H. MECHEM
(Counsel of Record)
Attorney for Respondent
John Doe

Of Counsel:

WILSON, WORLEY, GAMBLE & WARD, P.C.
ATTORNEYS AT LAW
Fourth Floor, Heritage Federal Building
110 East Center Street
P.O. Box 1007
Kingsport, Tennessee 37662-1007
(615) 246-8181

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Petition For Writ Of Certiorari
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BRIEF OF RESPONDENT JOHN DOE IN OPPOSITION

Respondent John Doe respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit, reported at 956 F.2d 545. The majority of facts in this matter were disputed, though this was ignored in Petitioners' Brief. As a result, Petitioners' statements of facts are incorrect, misleading and deal with matters not relevant to this case, necessitating a restatement of the pertinent facts considered below.

Statement of the Case

This is a civil rights action based on 42 U.S.C. §1983 in which John Doe alleges violations of his Eighth Amendment and Fourteenth Amendment rights. John Doe's claims arise from his incarceration in the Sullivan County, Tennessee Jail in September and October 1986. John Doe seeks recovery from Petitioners for his being harassed, assaulted, sexually assaulted and raped by fellow inmates while in the Sullivan County Jail. Following four days of testimony, the jury returned a verdict for John Doe in the amount of $100,000.00. The trial court did not disturb the verdict. Petitioners appealed. The Court of Appeals reversed and remanded based solely on an insufficient Fourteenth Amendment procedural due process charge. In its reversal, the Court of Appeals held the jury charge for the Eighth Amendment was legally sufficient, and that the facts were sufficient for submission of this claim and the claim for the procedural due process violation to the jury.

Summary of Argument

Petitioner obtained reversal of the jury's verdict. The decision below was in accord with the law applicable to inmates and prisoners under the Eighth and Fourteenth Amendments. No question of law justifies the grant of a writ of certiorari.

There was no classification of inmates in the jail in September 1986. Violent and non-violent inmates were

indiscriminately mixed.[1] Criminal histories were not investigated. There was a pervasive risk of harm to all inmates. John Doe was a member of an identifiable class of vulnerable inmates and was assaulted, sexually assaulted and raped in the jail. Not once did Petitioner have the forthrightness to write the word "rape" in his petition to this Honorable Court. Petitioner writes as though the word "rape" was not in the English language. Under the law of the State of Tennessee, Respondent was raped. This violent and degrading act was caused by Petitioners' wanton disregard for John Doe's safety, in violation of his rights under the Eighth and Fourteenth Amendments.

ISSUE PRESENTED TO THE JURY

The jury was asked only to decide whether Petitioners Sullivan County, Gardner or Hawkins created with deliberate indifference, by act or omission, a practice or custom with regard to classification (inmate safety) that proximately caused Respondent's rights under the Eighth Amendment of the United States Constitution to be violated and whether Petitioners arbitrarily deprived

[1] Petitioners' repeated references to Respondent as being "incorrectly classified" are simply irrelevant. Respondent's position has remained that neither he nor any of the other 140 some inmates in the jail in September 1986 were "classified." They simply were placed in an available bed, hopefully empty. Such random placing of violent and non-violent inmates throughout the jail is not a classification system. Petitioners attempt to imply that this is a case of a single misplaced inmate is misleading and does not reflect the issues involved.

Respondent of his rights under the Fourteenth Amendment (Vol. II, Tr. at 511-12).

FACTS

In September 1986, John Doe was nineteen years old, stood 6 feet, 1 inch tall, and weighed approximately 125 lbs. He has borderline mental faculties. It should have been obvious to all concerned at the Sullivan County Jail that John Doe was excessively vulnerable to inmate assault (Tr. 316-17). The inmates in Cell #3 had this impression with regard to John Doe. Inmate Tim Daniels said: "[John Doe] . . . and Tony [Bradley] . . . were the weak types" (Tr. 163). Inmate Kenny Copas said: "[John Doe] . . . is a small, weak-type and the others will pick on him" (Tr. 166). Inmate White (Mohammad) testified that he "sized" up [John Doe] . . . as "he came through the door" and he immediately saw that [John Doe] . . . "wasn't any trouble" (Tr. 120). Inmate Wilson said: "I felt sort of sorry for . . . [John Doe]. He is a weak-type and I don't think he belongs in jail" (Tr. 170).

A pervasive risk of harm existed at the jail.[2] Jailer Waterson told the jury he received complaints every day from inmates saying they were in danger and needed to be moved (Tr. 467). Inmate Cooke feared being assaulted in Cell #3. He stated that there were three or four fights

[2] The evidence showed that Cell #3 was one of the most violent cells in the Jail in September 1986. The evidence also showed the jail guards rarely responded to disturbances in the jail or inmate requests to be moved for their safety.

per day among the inmates at the jail (Tr. 107, 114). Inmates new to Cell #3 were greeted by a "welcoming committee". This committee would "size-up" an individual to see if there was "any fight in him" (Tr. 120). Antonio White said that fights among inmates were frequent, with numerous fights occurring most days (Tr. 122). Weapons were common in the jail (Tr. 343-44).

John Doe was in Cell #3 for approximately five (5) weeks in 1986. Several weeks prior to John Doe's being raped, Tyrone Ross assaulted Tony Bradley, also in Cell #3, with a homemade knife and tried to force him to perform oral sexual acts (Tr. 69, 76; Tr. 178). John Doe described the incident saying that Bradley "was just worried about his own survival" (Tr. 178). Ross repeatedly beat Bradley before and after John Doe was placed in Cell #3 (Tr. 69-70). Inmates Copas and Castle threatened John Cooke's life while the three were in Cell #3 (Tr. 109). Copas, Castle and other inmates in Cell #3 would cheer Ross on when he abused or harassed either Bradley or John Doe (Tr. 77). Prior to the rape, Ross was assisted by Daniels and Castle when they held John Doe and gave him a Mohawk hair cut against his will (Tr. 100-01). Later, Copas held John Doe while Ross sexually assaulted him (Tr. 107).

With regard to other incidents of abuse in September 1986, Inmate Cooke testified that Ross got in the shower with John Doe, John Doe "jumped back out of the shower", and Ross chased John Doe "with a toothbrush and his penis" (Tr. 104, 111). John Doe ran out of the shower and was "hollering for help", but none came (Tr. 114). Cooke saw Ross stick a toothbrush in "between" John Doe's "legs" from "the rear", and he saw Ross stick

his penis between John Doe's "legs from the rear" while John Doe was being held by other inmates in Cell #3 (Tr. 107). Bradley saw Ross rape John Doe with a toothbrush (Tr. 86). Later, Ross attempted to stick his "penis" in John Doe and John Doe screamed (Tr. 101).

Focusing on the Sullivan County Jail, Gordon Kampka (expert witness for Respondent) testified that a pervasive risk of harm existed for all inmates in September 1986 (Tr. 242-43). Kampka testified that the "serious incidents [at the jail] are not random or rare [and] . . . there is the regular pattern of occurrence that I frequently find, especially in severely overcrowded facilities" (Tr. 355).

"Non-violent" and "violent" male inmates were randomly placed throughout the jail depending on the availability of empty beds in September 1986 (Tr. 307). To demonstrate that the avowed classification practice resulted in a mixing of violent and non-violent inmates, Kampka reviewed the intake cards of those held in Cell #3 in September 1986. He found that these inmates' present offense or prior offenses included aggravated rape, aggravated assault and robbery, as well as those convicted of a misdemeanor such as John Doe (Tr. 418-19).

As presented in this case, the concept behind classification was promotion of inmate and staff safety by the reasoned placement of an inmate in a particular section of the jail based on whether the inmate was found to be a minimum, medium, or maximum security prisoner. Ex-Sheriff Gardner admitted that in September 1986 there was "no classification" system at the jail (Tr. 433). Jailer Ricky Waterson agreed, stating that there was no inmate

segregation. (Plaintiffs' Ex. 31, P. 18.) Jailer Waterson said, "We didn't have . . . [maximum, medium and minimum prisoners] sectioned" (Tr. 460).[3]

Under state statute Ex-Sheriff Mike Gardner was: "To take charge and custody of the jail of his county and of the prisoners therein . . . ", and "To perform such other duties as are . . . imposed by Law . . . ", T.C.A. §8-8-201(3) and (33); T.C.A. §41-4-101. Tennessee Code Annotated §41-4-410 states, "The Tennessee Corrections Institute [T.C.I.] has the power and its duty is to . . . establish minimum standards for local jails . . . " *Id.* The regulations promulgated by the T.C.I. require all local jails to implement written classification procedures for inmates. Sullivan County Sheriff Gardner drafted and professed to use such a policy, but later admitted the policies and procedures regarding classification in the jail's Policy and Procedure Manual were ignored. As a result, in a jail where a pervasive risk of harm existed, incoming inmates were randomly assigned to cells without regard to their prior institutional history, prior criminal history, present crime or vulnerability to inmate assault. (Tr. 433, 460, 861).

Hawkins, the Jail Administrator, said it would be "foolish" to ignore existing jail records prior to placement of incoming inmates (Tr. 841). He admitted that the Policy and Procedure Manual for the Sullivan County Jail directed him and his sergeants to review jail records before classifying inmates. Despite this, jail records were never reviewed. Upon release, each inmate's jail card, the

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[3] For a similar case involving the issue of classification and cell assignment for inmate safety see *Vosburg v. Salem,* 845 F.2d 763 (8th Cir. 1988) cert. denied 488 U.S. 928.

jail's only individual document concerning that inmate, was placed in storage (Tr. 861, 862).

The prior jail cards were stored in the same building in which Respondent was raped. The information the cards contained was never sought by Petitioners or their staff even though the Jail's Policy and Procedure Manual stated that the "jail administrator, chief jailer, or booking officer *will* review the admission's records and any existing facility records concerning 'incoming inmates' prior to classification." (Plaintiff's Ex. 8, Sullivan County Jail Policy and Procedure Manual, P. 114-15).

John Doe was abused, harassed, assaulted and raped by inmates with criminal histories which included assault and battery, assault, aggravated assault, statutory rape and aggravated rape (Tr. 418-19). Ross, the inmate who raped John Doe, has a history of institutional violence and he was returned to the Sullivan County Jail in August 1986 in part, for threatening to kill his girlfriend (Plaintiff's Ex. 28; Tr. 311). Less than six months prior to John Doe's rape, Ross was involved in two fights in two different cells in less than one hour in the Sullivan County Jail (Plaintiff's Ex. 1-A, Jail Log, April 7, 1986; Tr. 228). The Jail's Policy and Procedure Manual directs the jail staff to create "incident reports" for fights or altercations between inmates. The manual even provides a "Stock Incident Report", yet no incident reports were ever created by the jail staff prior to John Doe's being raped or any other assault within the jail – not one (Tr. 830). Without creating incident reports, the jail staff had no individual documentation with regard to Ross's history of prior institutional violence – an acknowledged indication of an inmate's propensity to be violent, and

thus, the need to be identified as "violent" for purposes of classification and placement in the jail. (Plaintiff's Ex. 8, Sullivan County Jail Policy and Procedure Manual, P. 115).

From March 1, 1976 through September 24, 1986, Sullivan County, Gardner and Hawkins were sent bi-annual reports based on inspections by the Tennessee Corrections Institute. These approximately twenty reports received by Petitioners informed them that the jail was overcrowded, that the individual cells in the Sullivan County Jail were inadequately lit, that fourteen day medical examinations were not done, and that the jail had no written classification plan (Tr. 224-27, 233-34; Plaintiff's Ex. 14). These reports were reviewed by Kampka who then testified that they indicated that the Defendants knew or should have known that the jail was overcrowded and that there was either no classification system or one that was non-functional (Tr. 361). Respondent's position at trial was that his mental disability was readily apparent; Petitioners disagreed. Even if Petitioners' position is assumed correct, they were required by their own policies and T.C.I. regulations to have a medical screening performed on all inmates within fourteen days of placement in the jail. Had this been done, Respondent's disability (vulnerability) would have been discovered by a competent physician during the health screening no later than ten days before the rape (Tr. 598-601).

With regard to his knowledge of inmate classification then Sheriff Gardner stated, "You could tell the classification was being done properly because my office was right in the middle of the jail" (Tr. 800-801). Sheriff Gardner

testified that Hawkins, the Jail Administrator, was responsible for ensuring there was proper classification of inmates (Tr. 803-04). Hawkins testified he had no involvement whatsoever with classification in September 1986. (Plaintiff's Ex. 33, at P. 10-11, 51.) Gardner later admitted there was no "classification" of inmates in September 1986 (Tr. 433).

Reasons for Denying the Petition for a Writ of Certiorari

I. PETITIONER WAS SUCCESSFUL IN THE COURT OF APPEALS IN OBTAINING A REVERSAL AND REMAND AND THE PETITION FOR CERTIORARI RAISES NO ISSUES OF IMPORTANCE WARRANTING THIS COURT'S IMMEDIATE CONSIDERATION.

Petitioner was successful in reversing the trial court's decision and the Court of Appeals remanded for further proceedings consistent with its decision. (Petition, App. 1-33.) The Court of Appeals found the jury charge for the Eighth Amendment to be appropriate and that the facts supported submission of that issue to the jury. This is consistent with the decisions of this Court and all the circuits that have decided this issue. *Whitley v. Albers*, 475 U.S. 312 (1986); *Roland v. Johnson*, 856 F.2d 764 (6th Cir. 1988). However, the Court of Appeals adopted Petitioners' argument with regard to the Fourteenth Amendment procedural due process jury charge finding it was inadequate. *E.g. Kentucky Department of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990). Nothing in the Court of Appeals' decision warrants review by this Court.

II. QUESTIONS I, IA, IB, IC AND ID, PRESENTED IN THE PETITION FOR CERTIORARI WERE NOT RAISED, PASSED ON, OR PRESERVED IN THE DISTRICT COURT OR THE COURT OF APPEALS AND CANNOT BE DECIDED ON THIS RECORD.

The Court would be required to render an impermissible advisory opinion should it undertake to answer questions I, IA, IB, IC or ID as listed in the Petition. *United Public Works v. Mitchell,* 330 U.S. 75, 89 (1947). Each of these questions deal with the Fourteenth Amendment. Petitioners did not present or argue the facts at trial relating to the procedural due process used or procedures available. Respondent felt it was factually clear that simply no procedural due process was given him. Petitioners were given the relief they sought, but now ask this Court to rule on a new issue at this level. The issues urged on this Court were not ruled on below and should not now be considered. *Springfield v. Kibbe,* 480 U.S. 257 (1987); *Adickes v. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970); *California v. Taylor,* 353 U.S. 553, 556, n.2 (1957).

A. The Court of Appeals reversed the lower court but gave no specific instructions regarding the language for the jury charges to be used by the trial court.

The Court of Appeals did not instruct the trial court as to specific language it should use in charging the jury. The Court of Appeals in no way indicated that Petitioners were automatically liable for Respondent being raped. Liability, if automatic, stems from the undisputed fact that the sheriff of Sullivan County admitted at trial and in the local media that the Sullivan County Jail had no

classification system. How can Petitioners complain about a jury charge that has yet to be written? The trial court's charge regarding the Fourteenth Amendment was found to be inadequate and the Court of Appeals instructed the trial court to correct any and all deficiencies, as Petitioners' requested on appeal.

Gardner was "To take charge and custody of the jail of his county and of the prisoners therein . . . ", and "To perform such other duties as are . . . imposed by Law . . . ". T.C.A. §8-8-201(3) and (33); T.C.A. §41-4-101. Tennessee Case Annotated §41-4-410 states, "The Tennessee Corrections Institute has the power and its duty is to . . . establish minimum standards for local jails . . . " *Id.* The regulations promulgated by the T.C.I. state that all local jails *would draft* and *implement* written classification procedures for inmates. As the highest and final policy making authority for the Sullivan County Jail, ex-Sheriff Gardner was obligated by state law to establish the policies regarding inmate classification and placement at his jail. Sullivan County Sheriff Gardner drafted and professed to use such a policy.

The policy manual and the mandatory language contained therein regarding inmate classification was ignored, with inmates being randomly placed in beds as they became available. No reason was given by Petitioners at trial or on appeal explaining why the mandatory language in the Policy Manual was ignored. This was an arbitrary deprivation of Respondent's procedural due process rights.

B. The Court of Appeals found that the jury was not properly instructed on the issue of violation of procedural due process under the Fourteenth Amendment and remanded the case for rehearing.

All issues concerning the Fourteenth Amendment and procedural due process are to be reconsidered by the trial court on remand.

It is well established that to avoid ruling on hypothetical questions the trial court and the Court of Appeals should be given the opportunity to pass upon a legal issue before being reviewed by the United States Supreme Court. The issues raised by Petitioner are not of such importance that this traditional doctrine should be ignored.

III. THE ISSUE RAISED IN QUESTION IIB PRESENTED IN THE PETITION FOR CERTIORARI DEALS WITH THE EIGHTH AMENDMENT AND WAS NOT RAISED, PASSED ON, OR PRESERVED BY THE DISTRICT COURT OR THE COURT OF APPEALS AND CANNOT BE DECIDED ON THIS RECORD.

The Court of Appeals was not asked to rule upon what specific evidence was admissible before the jury so it could determine whether there was a pervasive risk of harm when John Doe was raped, or what evidence was admissible to establish that John Doe was a member of a class of inmates vulnerable to attack. These issues were not raised at trial and are waived. *Wainwright v. Sykes*, 433 U.S. 72, 91 fn.14 (1977).) Nor did the Petitioners raise this issue at the Court of Appeals.

Moreover, the relevance of statements by former inmates that they were "afraid" must not be taken out of context, and the weight to be accorded that testimony, as with all other testimony, is within the province of the jury. The same is true for testimony from jail guards that inmates asked to be moved "every day" because they were in danger, testimony from inmates that they received death threats, testimony from inmates that they were constantly harassed, beaten and sexually assaulted while in Cell #3 at the Sullivan County Jail in August and September 1986.[4]

The jury was given the opportunity, as it should have been, to observe John Doe and to consider both jailers' and inmates' impressions with regard to John Doe's limitations to determine whether it should have been obvious to the jailers that he was a special problem inmate in terms of being vulnerable to inmate assaults.

IV. QUESTION ID PRESENTED IN THE PETITION FOR WRIT OF CERTIORARI PRESENTS AN ABSTRACT ISSUE REGARDING THE FOURTEENTH AMENDMENT AND IS DEPENDENT ON ASSUMED FACTS NOT ESTABLISHED IN THE TRIAL COURT.

Petitioners offered no evidence regarding the types of hearings that might have been available to John Doe with

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[4] Respondent adopts the holding of the Court of Appeals that *The City of Los Angeles v. Heller*, 475 U.S. 796 (1986) (Per Curiam) is inapplicable to the claims brought against Petitioners (Petition, App. 15-18.)

regard to his placement in Cell #3 in 1986 or with regard to hearings following his placement in Cell #3 in September of 1986. Neither the trial court nor the Court of Appeals made legal determinations or applied the law concerning procedural due process to the facts of this case, or specifically determined whether Petitioners' acts were random and unauthorized. This Court's rendering of a decision on these fact specific issues at this stage would constitute an inappropriate advisory opinion.

V. THE COURT OF APPEALS CORRECTLY DECIDED THIS CASE WITH REGARD TO FEDERAL LAW.

This case presents no important unanswered questions of federal law and basically involves the resolution of disputed facts. The jury found the facts against Petitioners and the Court of Appeals reversed and remanded. The majority of the facts in this case remain disputed, making resolution of any issue presented by Petitioners difficult at best.

The allegations that confusion and conflict exist among the circuits with regard to the Eighth Amendment or the Fourteenth Amendment is simply untrue. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Whitley v. Albers*, 475 U.S. 312 (1986); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Roland v. Johnson*, 856 F.2d 764, 769 (6th Cir. 1988).

The cases cited in the Petition on p. 23 certainly reveal no confusion among the circuits regarding the Eighth Amendment. While the outcomes may vary, the legal standards applied are the same. In *Apodaca v. Rio Arriba County Sheriff's Department*, 905 F.2d 1445 (10th Cir. 1990), the court dealt with the Fourth Amendment, but

imposed an intent requirement for finding liability. In *Williams v. Borough of West Chester,* 891 F.2d 458 (3rd Cir. 1990), the court held that a municipality may be liable only if it acted with deliberate indifference to the consequences of a policy that caused plaintiff's harm. *Williams, supra,* 891 F.2d at 467 fn 14. In *Partridge v. Two Unknown Police Officers of Houston,* 791 F.2d 1182 (5th Cir. 1986), the court held that plaintiff must establish evidence of callous or deliberate indifferences toward the rights of detainees known to be prone to suicide or dangerous to others in order to recover. In *Wilkes v. Young,* 897 F.2d 896 (7th Cir. 1990), the court held under the Eighth Amendment a prison official will be liable only if the challenged conduct exhibits a conscious disregard for an inmate's rights. In *Redman v. County of San Diego,* 896 F.2d 362 (9th Cir. 1990), the court held that to recover an inmate must show defendants were deliberately indifferent to a substantial risk of harm to prove an Eighth Amendment violation. In *Vosburg v. Salem,* 845 F.2d 763 (8th Cir. 1988), deliberate indifference was required – and found – where there was *no* policy for separating violent and non-violent inmates based at least on prior criminal history or institutional behavior.

A. The Eighth Amendment does not preclude claims under the Fourteenth Amendment involving state created liberty interests.

The due process provisions of the Fourteenth Amendment provide protected liberty interests to prisoners in two ways. *Hewitt v. Helms,* 459 U.S. 460 (1983). One is the general concept of liberty interest flowing from the Fourteenth Amendment itself. The second flows from

state related liberty interests created by procedures, statutes, regulations, or other material which limits the discretion of state officials. No case has been cited by Petitioner, and respondent can find none, where any court has found that the Eighth Amendment precludes an inmate's claims for relief under the procedural due process clause of the Fourteenth Amendment for state related or created liberty interests.

The Tennessee Corrections Institute (T.C.I.) has issued minimum regulations for the operation of county jails. These regulations require the sheriff, as a state official, to create written classification procedures for the safe keeping of inmates in county jails. In Tennessee, the sheriff, by act of the state legislature, is the official solely responsible for the keeping of prisoners in county jails. T.C.A. §41-4-101. Respondent Sullivan County and then Sheriff Gardner issued the Policy and Procedure Manual for the Sullivan County Jail which contained the explicit provisions regarding classification cited by the Court of Appeals in its opinion. *John Doe v. Sullivan County,* 956 F.2d at 557 n. 4 (6th Cir. 1992); *see also Kentucky Department of Corrections v. Thompson,* 490 U.S. 454, 460 (1989); *Walker v. Norris,* 917 F.2d 1449 (6th Cir. 1990); *Martucci v. Johnson,* 944 F.2d 291, 294 (6th Cir. 1991), *quoting, Wolff v. McDonnell,* 418 U.S. 539 (1974). The mandatory language in the Policy and Procedure Manual creates a protected liberty interest under the Fourteenth Amendment and as found by the trial court and the Court of Appeals, Respondent pled and presented sufficient facts to implicate the procedural due process protections of the Fourteenth Amendment.

The Court should not consider this issue because the relationship between the Eighth and Fourteenth Amendment was set forth in *Whitley v. Albers*, 475 U.S. 312 (1986). In the context of "prison security" in an emergency situation this Court found the Eighth Amendment "serves as the primary source of protection" regarding claims of excessive force. *Whitley*, 475 U.S. at 326. *Whitley* did not involve a procedural due process claim. *Id.*

This is not a case involving an emergency situation arising from a prison riot. In this case, Petitioners had nearly a month to deliberate on John Doe's classification and make a decision regarding pre-deprivation hearings, not seconds during a prison riot as in *Whitley, supra.* Petitioners have not developed at any level the facts, law and arguments to allow this Court to properly address the relationship between the Eighth Amendment and Procedural Due Process. Upon remand Petitioners will have that opportunity.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

EVERETT H. MECHEM
(Counsel of Record)
Attorney for Respondent
John Doe

Of Counsel:

WILSON, WORLEY, GAMBLE & WARD, P.C.
ATTORNEYS AT LAW
Fourth Floor, Heritage Federal Building
110 East Center Street
P.O. Box 1007
Kingsport, Tennessee 37662-1007
(615) 246-8181